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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

**No. 909**

**PHOENIX-EL PASO EXPRESS, INC.,**

*Petitioner,*

*vs.*

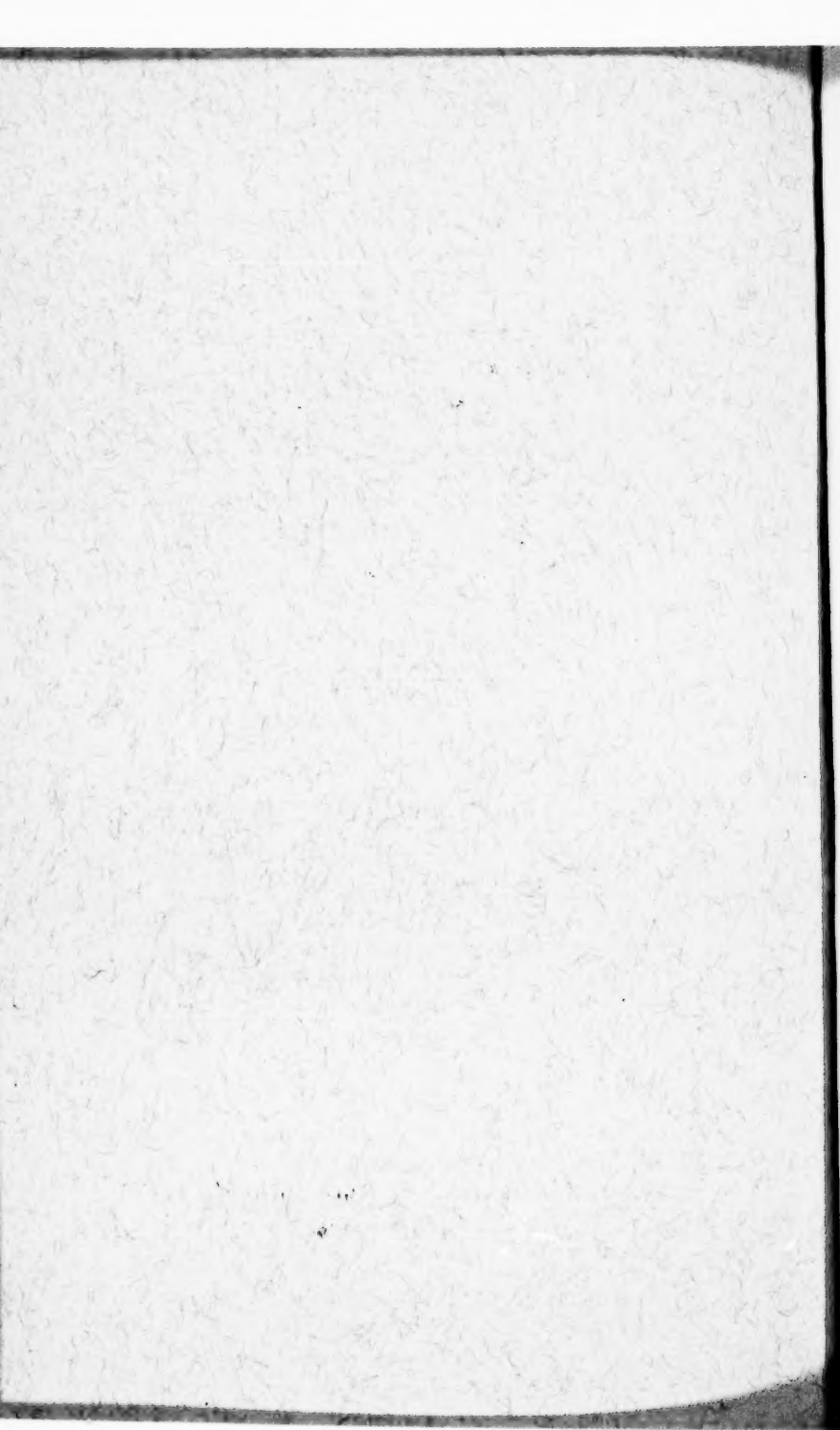
**NATIONAL CARLOADING CORPORATION.**

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF TEXAS AND BRIEF IN  
SUPPORT THEREOF.**

**ROBERT L. HOLLIDAY,**

**HAROLD L. SIMS,**

*Counsel for Petitioner.*



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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**No. 909**

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PHOENIX-EL PASO EXPRESS, INC.,  
*Petitioner,*  
*vs.*

NATIONAL CARLOADING CORPORATION.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF TEXAS.**

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*To the Honorable, the Supreme Court of the United States:*

Your petitioner, Phoenix-El Paso Express, Inc., respectfully presents this, its petition for certiorari to the Supreme Court of the State of Texas, and to such end respectfully shows:

**Summary and Short Statement of the Matter Involved.**

On October 28, 1941, petitioner, as plaintiff, recovered judgment against respondent National Carloading Corporation for the sum of Nine Hundred Ninety-Nine Dollars and Sixty-Eight Cents (\$999.68) in the Forty-First Judicial District Court of El Paso County, Texas (R. 26-33). This

judgment was based upon the cause of action alleged by petitioner in its second amended original petition, which may be briefly summarized as follows:

Petitioner's predecessor in interest and assignor, at all times relevant, was a federal motor common carrier operating between El Paso, Texas, and Phoenix, Arizona, under authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. During the period of July, 1937, to November, 1937, petitioner's predecessor and assignor carried nine freight shipments from El Paso to Phoenix for respondent, and collected from respondent freight charges therefor based upon a rate of Forty-Five Cents (\$.45) per hundred pounds. Said shipments moved in interstate commerce under written bills of lading or shipping orders issued by respondent. Said freight rate of Forty-Five Cents per hundred pounds was paid by respondent and received by petitioner's predecessor by virtue of a preexisting oral arrangement between the parties. At all times relevant, petitioner's predecessor had established, published, and duly on file with the Interstate Commerce Commission its tariffs which provided that the applicable rate between El Paso, Texas, and Phoenix, Arizona, was Eighty-Five Cents (\$.85) per hundred pounds. The Forty-Five Cents per hundred pounds rate was paid by respondent and received by petitioner under respondent's claim that it was a federal motor common carrier or contract carrier, and thus was entitled to participate in joint rates with petitioner's predecessor, or was entitled to pay petitioner's predecessor only a division of the through rate established by respondent. Petitioner further alleged that on January 4, 1940, the Interstate Commerce Commission had found that respondent was a freight forwarder and not a common carrier by motor vehicle, or a contract carrier by motor vehicle, such decision being



rendered in Docket No. MC-40,639, reported in 21 MCC 309. Petitioner further alleged that respondent was not entitled to share in so-called joint rates or concurrences with petitioner's predecessor or other motor common carriers because of the decision rendered May 7, 1940, by the Interstate Commerce Commission in the cause styled *Tariffs of Forwarding Companies, Ex Parte, No. MC-31*, reported in 23 MCC 95. Petitioner alleged that it was therefore entitled to collect the difference between the Forty-Five Cent rate paid by respondent as freight charges on the nine shipments, and the legal rate of Eighty-Five Cents per hundred pounds as required by its published and filed tariffs (R. 1-11). Judgment was rendered in the trial court in petitioner's favor and against respondent for such difference in the freight charges (R. 26-33).

Thereafter, in due time, upon its motion for new trial being overruled, respondent gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, sitting at El Paso (R. 40-41).

While the cause was pending on appeal, the Congress of the United States enacted Part IV of the Interstate Commerce Act (Public Law No. 558, 77th Congress, Second Session, app. May 16, 1942) (Act May 16, 1942, c. 318 § 1, Stat. 284) (Title 49 U. S. C. Secs. 1001-1022).

The Court of Civil Appeals reversed petitioner's judgment on the sole ground that said statute, and in particular, Section 419 of Part IV of the Interstate Commerce Act, granted respondent immunity from all past liability and thus abolished petitioner's cause of action and judgment based thereon (R. 41-50). The Court of Civil Appeals ordered the cause remanded to the trial court with instructions to dismiss petitioner's suit (R. 50).

Thereafter, petitioner applied for writ of error from the Supreme Court of Texas to the Court of Civil Appeals,

and its application was granted. The Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals (R. 63-73). Ever since the passage of said Part IV of the Interstate Commerce Act, petitioner in both Court of Civil Appeals and in the Supreme Court of Texas has contended and still contends that said Section 419 of Part IV of the Interstate Commerce Act is not retroactive and not applicable to petitioner's cause of action and was not so intended by the Congress, and that if Congress, in enacting said statute, intended such effect, that such statute would be unconstitutional in depriving petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

#### **This Honorable Court Has Jurisdiction.**

Judgment in the trial court was rendered in favor of petitioner and against respondent on October 28, 1941 (R. 26-33). Respondent gave notice of appeal to the Court of Civil Appeals on December 30, 1941 (R. 40-41). Section 419 of Part IV of the Interstate Commerce Act was approved May 16, 1942. The Court of Civil Appeals rendered its decision April 1, 1943, reversing the judgment of the trial court and remanding the cause with instructions to dismiss petitioner's suit (R. 41-50). The order of the Court of Civil Appeals based upon its decision was entered April 1, 1943 (R. 50).

As shown by its opinion, the Court of Civil Appeals reversed petitioner's judgment on the sole ground that said Section 419 of Part IV of the Interstate Commerce Act granted respondent immunity from all past liability for freight shipments which occurred prior to the enactment of said statute, even though such claimed freight charges had been reduced to judgment prior to the passage of said law.

Since the law had not been enacted at the time suit was tried in the district court, petitioner could not there raise the Federal questions here urged; but at the first opportunity, it did raise said questions, that is to say, petitioner on April 15, 1943, filed its motion for rehearing, in the Court of Civil Appeals. In said motion for rehearing, petitioner, by proper assignments of error, attacked the holding of the Court of Civil Appeals that Section 419 of Part IV of the Interstate Commerce Act abolished petitioner's cause of action and judgment based thereon by granting immunity from liability for past freight charges due by respondent.

Petitioner expressly charged the Court of Civil Appeals with error in holding (1). that said statute bars recovery by petitioner against respondent; (2). that said Act of Congress was intended to be, or was in fact, applicable to petitioner's cause of action; (3). that said statute extended to and was applicable to civil liability rather than being limited to criminal liability or punishment; (4). that said statute granted respondent immunity from civil liability against petitioner's cause of action; (5). that said Section 419 of Part IV of the Interstate Commerce Act was constitutional and not violative of the "due process clause" of the Fifth Amendment to the Constitution of the United States, insofar as said Act of Congress was intended to be, or was in fact, applicable to petitioner's cause of action; and (6). petitioner charged that the holding of the Court of Civil Appeals deprived petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States (R. 51-52).

On April 22, 1943, the Court of Civil Appeals entered its order to the effect that petitioner's motion for rehearing was duly considered but overruled (R. 55). In connection with its order overruling petitioner's motion for rehearing, the Court of Civil Appeals wrote a short addi-

tional opinion holding that where Congress has created a cause of action, it may be taken away at any time (R. 55).

In due time, on May 21, 1943, petitioner filed its application for writ of error from the Supreme Court of Texas to the Court of Civil Appeals (R. 56-62), and such application was granted by the Supreme Court of Texas by order entered July 21, 1943 (R. 62).

In its application for writ of error, petitioner specifically raised the Federal questions here urged by six assignments of error, which may be summarized as follows: The Court of Civil Appeals erred in reversing petitioner's judgment and ordering the cause dismissed (1). by holding that Section 419 of Part IV of the Interstate Commerce Act granted respondent immunity from civil liability; (2). by holding that said statute was applicable to petitioner's cause of action; (3). by holding that said statute bars any recovery by petitioner against respondent; (4). by holding that said Section 419 of Part IV of the Interstate Commerce Act was not limited to criminal liability or punishment; (5). by holding that Section 419 of Part IV of the Interstate Commerce Act was constitutional and not repugnant to the "due process clause" of the Fifth Amendment to the Constitution of the United States insofar as said statute was intended to be, or was in fact, applicable to petitioner's cause of action; and (6). that the opinion of the Court of Civil Appeals and judgment based thereon, reversing petitioner's judgment, was a deprivation of petitioner's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States (R. 56-58).

On December 15, 1943, the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals by order entered that day (R. 74-75) in accordance with the written opinion of the Supreme Court of Texas (R. 63-73). As shown by its opinion, the Supreme Court of Texas affirmed

the judgment of the Court of Civil Appeals on the sole proposition that said Section 419 of Part IV of the Interstate Commerce Act abolished petitioner's cause of action and judgment based thereon, and the Court expressly held that said statute did not violate the "due process clause" of the Fifth Amendment to the Constitution of the United States (R. 63-73).

On December 28, 1943, petitioner duly filed its motion for rehearing in the Supreme Court of Texas. In its motion for rehearing, petitioner properly raised the Federal questions urged here by proper assignments of error, which are summarized as follows: The Supreme Court of Texas erred (1) in holding that Section 419 of Part IV of the Interstate Commerce Act bars any recovery by petitioner against respondent; (2) that said statute was intended to be applicable to petitioner's cause of action which accrued long prior to the passage of said act; (3) in failing to hold that said statute was limited to criminal liability or punishment, not extending to civil liability; (4) in holding that said statute granted respondent immunity from civil liability against petitioner's cause of action; (5) in holding that said statute was constitutional and not violative of the "due process clause" of the Fifth Amendment to the Constitution of the United States insofar as said statute was intended to be, or was in fact, applicable to petitioner's cause of action; (6) in holding that the judgment of the Court of Civil Appeals should be affirmed upon the sole ground that said Section 419 of Part IV of the Interstate Commerce Act bars any recovery by petitioner, such holding depriving petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States; (7) in holding that said Section 419 of Part IV of the Interstate Commerce Act was intended to have a retroactive effect, thereby abolishing petitioner's cause of action; (8) in holding that petitioner's cause of action was a mere statu-

tory right which could be repealed, and deprive petitioner of its cause of action (R. 75-77).

On January 19, 1944, the Supreme Court of Texas entered its order overruling petitioner's motion for rehearing, such order reciting that petitioner's motion was overruled after due consideration of same (R. 77).

Petitioner here seeks review of the final judgment of the Supreme Court of Texas entered January 19, 1944, overruling petitioner's motion for rehearing (R. 77). The Supreme Court of Texas is the highest court of the State in which a decision could be had. Art. V, Sections 1 and 3, Constitution of Texas; Art. 1728, Revised Civil Statutes of Texas, 1925. This petition for certiorari is filed within three months of January 19, 1944, and there is presented herewith a certified copy of the transcript of the record and proceedings in the Supreme Court of Texas.

The Supreme Court of the United States, in view of the foregoing, has jurisdiction to issue the writ of certiorari to the Supreme Court of Texas by virtue of Section 237 (b) of the Judicial Code, as amended (28 U. S. C. Section 344 (b)). Petitioner having drawn in question the validity of Section 419 of Part IV of the Interstate Commerce Act, and the Supreme Court of Texas having sustained respondent's claimed right, privilege, and immunity under said statute, —Section 419 of Part IV of the Interstate Commerce Act, —this Honorable Court should issue the writ because the Federal questions presented are substantial.

Said Section 419 of Part IV of the Interstate Commerce Act (Public Law No. 558, 77th Congress, Second Session, app. May 16, 1942) (Act May 16, 1942, c. 318 § 1, Stat. 284) (Tit. 49 U. S. C. Secs. 1001-1022) provides:

“LIABILITY FOR PAST ACTS AND OMISSIONS.

“No person shall be subject to any punishment or liability under the provisions of this act on account of

any act done or omitted to be done prior to the effective date of this Part, in connection with the establishment, charging, collection, receipt or payment of rates of freight forwarders or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act."

As codified, said section appears in 49 U. S. C. Sec. 1019 as follows:

"LIABILITY FOR PAST ACTS AND OMISSIONS.

"No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8, and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle, subject to this chapter and chapters 1, 8, and 12 of this title."

Said statute was never meant by Congress to be applicable to petitioner's cause of action, and its application should be limited to past criminal liability and punishment, under familiar rules of statutory construction. *Right of Way Oil Co. vs. Gladys City Oil and Gas Co.*, 106 Tex. 94, 157 S. W. 737.

The Congress never intended said statute to have a retroactive application, which would abolish petitioner's cause of action: *U. S. vs. St. L. S. F. & T. Ry. Co.*, 270 U. S. 1, 46 S. Ct. 182, 70 L. Ed. 435; *Reynolds vs. McArthur*, 27 U. S. 417, 2 Pt. 417, 7 L. Ed. 470; *Hassett vs. Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858; *U. S. Fidelity & Guaranty vs. U. S.*, 209 U. S. 306, 28 S. Ct. 537, 52 L. Ed. 804; *In Re Twenty Per Cent Cases*, 87 U. S. 179, 20 Wall. 179, 22 L. Ed. 339; *U. S. vs. Heth*, 3 Cranch 399, 2 L. Ed. 479; *U. S. vs. Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82; *Shwab vs. Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747.



The construction placed upon said Section 419 of Part IV of the Interstate Commerce Act by the State Appellate Courts had the effect of abolishing petitioner's cause of action and judgment based thereon, and thus constituted a deprivation of petitioner's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. *U. S. v. St. L. S. F. & T. Ry. Co.*, 270 U. S. 1, 46 S. Ct. 182, 70 L. Ed. 435; *Herrick v. Boquillas Land & Cattle Co.*, 200 U. S. 97, 26 S. Ct. 192, 50 L. Ed. 389; *Pacific Mail Steamship Co., v. Joliffe*, 69 U. S. 450, 2 Wall. 450, 17 L. Ed. 805; *Chemical Foundation v. Du Pont* (C. C. A.) 39 F. (2d) 366, affirmed 283 U. S. 152, 51 S. Ct. 403, 75 L. Ed. 919; *Pritchard v. Norton*, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; *Lynch v. U. S.*, 292 U. S. 571; 54 S. Ct. 840, 78 L. Ed. 1434; *Ettor v. Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773; *Forbes Pioneer Boat Co. v. Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647; *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941.

The foregoing authorities clearly demonstrate that the Federal questions here urged are substantial, and this Honorable Court has never passed upon them. It is respectfully submitted that the Court has jurisdiction to issue the writ and correct the judgment of the State Court.

### **The Questions Presented.**

The ultimate question presented for review is whether or not said Section 419 of Part IV of the Interstate Commerce Act bars petitioner any recovery against respondent and has the effect of granting respondent immunity from liability for all freight charges incurred prior to the passage of said statute. The answer to this ultimate question depends upon the answers to the following three component questions: 1. Did Congress intend said Section 419 of Part IV of the Interstate Commerce Act to apply to civil actions



as well as to criminal liability? 2. Did Congress intend said statute to have a retroactive effect as to accrued civil causes of action? 3. If said statute should be applied to petitioner's cause of action, is said statute constitutional and not repugnant to the "due process clause" of the Fifth Amendment to the Constitution of the United States?

### **Reasons for Allowance of the Writ.**

The Supreme Court of Texas decided the foregoing substantial Federal questions which have not been determined by the Supreme Court of the United States, and decided said questions in a way probably not in accord with the applicable decisions of the Supreme Court for the United States.

### **Opposing Counsel.**

Counsel for respondents are Mr. Thornton Hardie, 710 Bassett Tower, El Paso, Texas, Mr. P. J. Coughlin of New York City, and Mr. Robert E. Quirk of Washington, D. C., and they have been duly served with copies of this Petition, supporting brief, and the record herein.

Wherefore, for the reasons set forth herein, as well as in the supporting brief annexed hereto, petitioner respectfully prays this Honorable Court to issue its writ of certiorari to the Supreme Court of Texas, commanding said State Court to send up forthwith a full and complete transcript of the record, that all proceedings be certified to this Court, and that this cause be reviewed and the errors of the Supreme Court of Texas be corrected, as provided by law; that upon hearing by this Honorable Court, the judgment of the Supreme Court of Texas be reversed, and that the judgment in petitioner's favor, rendered in the Forty-First Judicial District Court of El Paso County, Texas, be affirmed, and

that petitioner recover its interest thereon and all costs and for such further relief to which petitioner may be entitled to receive.

ROBERT L. HOLLIDAY,  
*El Paso, Texas.*  
 HAROLD L. SIMS,  
*El Paso, Texas.*  
*Attorneys for Petitioner.*

THE STATE OF TEXAS,  
 County of El Paso:

Robert L. Holliday, being duly sworn, says that he is of counsel for Phoenix-El Paso Express, Inc., petitioner in the foregoing petition for certiorari, that he prepared the foregoing petition, and that the allegations therein contained are true and that there is just cause for same as he verily believes.

ROBERT L. HOLLIDAY.

Subscribed and sworn to before me this 8th day of April, 1944.

[SEAL]

STEPHEN BROWN,  
*Notary Public,*  
*El Paso County, Texas.*

